MAR. 29. 2004

No. 03-6696

IN THE

Supreme Court of the United States

YASER ESAM HAMDI, ET AL.,

Petitioners,

v.

DONALD RUMSFELD, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CITIZENS FOR THE COMMON DEFENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ADAM H. CHARNES
Counsel of Record
JAMES J. HEFFERAN, JR.
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300

Counsel for Amicus Curiae

March 29, 2004

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. THE EXECUTIVE POSSESSES AUTHORITY TO DETAIN HAMDI AS AN ENEMY COMBATANT 5

A. The President's Inherent Powers As Commander In Chief Authorize The Executive's Detention Of Hamdi. 5

B. Congress Authorized The Executive To Detain Hamdi 15

II. UNDER SETTLED DUE PROCESS PRINCIPLES, HAMDI RECEIVED ALL THE PROCESS THAT HE IS DUE 17

A. The Laws Of War, The Separation Of Powers, And Precedent All Require Deferential Review Of The Military's Detention Of Hamdi 20

B. Acceptance Of Petitioners' Arguments Would Interfere Dramatically With National Security 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Aptheker v. *Sec'y of State*, 378 U.S. 500 (1964) 18
Bannerman v. *Snyder*, 325 F.3d 722 (6th Cir. 2003) 22
Brinegar v. *United States*, 338 U.S. 160 (1949) 28
Brosius v. *Warden*, 278 F.3d 239 (3d Cir. 2002) 24
Brown v. *Hiatts*, 82 U.S. (15 Wall.) 177 (1872) 12, 13
Brown v. *United States*, 12 U.S. (8 Cranch) 110 (1814) 16, 17
Burns v. *Wilson*, 346 U.S. 137 (1953) 24
Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 5, 23
Colepaugh v. *Looney*, 235 F.2d 429 (10th Cir. 1956) 10, 20
Costello v. *United States*, 350 U.S. 359 (1956) 28
Cox v. *United States*, 332 U.S. 442 (1947) 24
DaCosta v. *Laird*, 471 F.2d 1146 (2d Cir. 1973) 25
Dalton v. *Specter*, 511 U.S. 462 (1994) 4, 5
Dep't of the Navy v. *Egan*, 484 U.S. 518 (1988) 23
Duncan v. *Kahanamoku*, 327 U.S. 304 (1946) 13
Eagles v. *United States ex rel. Samuels*, 329 U.S. 304 (1946) 17, 24
Ex parte Endo, 323 U.S. 283 (1944) 13
Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 13

Table of Authorities—continued

Page

Ex parte Quirin, 317 U.S. 1 (1942) 4, 10, 13, 27
Fleming v. *Page*, 50 U.S. (9 How.) 603 (1850) 6
Garza v. *Lappin*, 253 F.3d 918 (7th Cir.), *cert. denied*, 533 U.S. 924 (2001) 22
Gerstein v. *Pugh*, 420 U.S. 103 (1975) 28
Gilligan v. *Morgan*, 413 U.S. 1 (1973) 25
Greenholtz v. *Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979) 19
Haig v. *Agee*, 453 U.S. 280 (1981) 18
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 23
In re Stacy, 10 Johns. 328 (N.Y. 1813) 13
In re Territo, 156 F.2d 142 (9th Cir. 1946) 10
In re Yamashita, 327 U.S. 1 (1946) 27, 28
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 26
Johnson v. *Jones*, 44 Ill. 142 (1867) 10
Juragua Iron Co. v. *United States*, 212 U.S. 297 (1909) 12
Lamar v. *Browne*, 92 U.S. 187 (1875) 9, 14
Ludecke v. *Watkins*, 335 U.S. 160 (1948) 9
Luther v. *Borden*, 48 U.S. (7 How.) 1 (1849) 5, 16, 23
Martin v. *Mott*, 25 U.S. (12 Wheat.) 19 (1827) 24
Miller v. *United States*, 78 U.S. 268 (1870) 12
Moyer v. *Peabody*, 212 U.S. 78 (1909) 8, 17
Murray v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 16

Table of Authorities—continued

Page

NLRB v. *Remington Rand, Inc.*, 94 F.2d 862 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938) 28
Padilla v. *Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, No. 03-1027 ..... 6, 10, 15, 16
Reid v. *Covert*, 354 U.S. 1 (1957) 13, 26
Respublica v. *Chapman*, 1 U.S. (1 Dall.) 53 (Pa. 1781) 9
Rumsfeld v. *Padilla*, No. 03-1027 4
S & E Contractors, Inc. v. *United States*, 406 U.S. 1 (1972) 15
Stencel Aero Eng'g Corp. v. *United States*, 431 U.S. 666 (1977) 25
The Andromeda, 69 U.S. (2 Wall.) 481 (1864) 14
The George, 14 U.S. (1 Wheat.) 408 (1816) 14
The Prize Cases, 67 U.S. (2 Black) 635 (1862) 9, 23
The Venus, 12 U.S. (8 Cranch) 253 (1814)) 12
United States ex rel. Perez v. *Warden*, 286 F.3d 1059 (8th Cir.), *cert. denied*, 537 U.S. 869 (2002) 22
United States ex rel. Wessels v. *McDonald*, 265 F. 754 (E.D.N.Y. 1920) 6
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). 6
United States v. *Salerno*, 481 U.S. 739 (1987) 8
Wang v. *Ashcroft*, 320 F.3d 130 (2d Cir. 2003) 22
Wesson v. *U.S. Penitentiary Beaumont, TX.*, 305 F.3d 343 (5th Cir. 2002), *cert. denied*, 537 U.S. 1241 (2003) 22

Table of Authorities—continued

Page

Zschernig v. *Miller*, 389 U.S. 429 (1968) 26

CONSTITUTION, STATUTES AND REGULATION

U.S. CONST. pmbl. 30
U.S. CONST. art. II, § 2, cl. 1 5
U.S. CONST. art. VI, § 2 16
U.S. CONST. amend. V 20
U.S. CONST. amend. VI 20
Act for the Safe Keeping and Accommodation of Prisoners of War, 2 Stat. 777 (1812) 17
Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) 16
Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 821 10
Article 104 of the Uniform Code of Military Justice, 10 U.S.C. § 904 11
Article 106 of the Uniform Code of Military Justice, 10 U.S.C. § 906 12
10 U.S.C. § 956(5) 16, 17
18 U.S.C. § 4001(a) 15
28 U.S.C. § 2241(c)(3) 22
Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) 27

ADVISORY OPINIONS

Military Commissions, 11 Op. Att'y Gen. 297 (1865) 12
Unlawful Traffic with Indians, 13 Op. Att'y Gen. 470 (1871) 12

Page

LEGISLATIVE HISTORY

H.R. REP. NO. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435 15

INTERNATIONAL AGREEMENTS

Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ..... 7, 8, 21, 27
Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 7
Rome Statute of the International Criminal Court, art. 69(4), U.N. Doc. A/CONF.183/9 (1998) 29

SCHOLARLY AUTHORITIES

David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61 (1996) 10
Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81 (1997) 29
Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L REV. RED CROSS 45 (2003) 8
Susan Elman, *Prisoners of War under the Geneva Convention*, 18 INT'L & COMP. L.Q. 178 (1969) 8, 9
ROBERT R. GLASS & PHILLIP B. DAVIDSON, INTELLIGENCE IS FOR COMMANDERS (1948) 28

Page

Stanley J. Glod & Lawrence J. Smith, *Interrogation under the 1949 Prisoners of War Convention*, 21 MIL. L. REV. 145 (1963) 27
William B. Hesseltine, *Civil War Prisons—Introduction, in* CIVIL WAR PRISONS 5 (William B. Hesseltine ed., 1972) 11
Knut Ipsen, *Combatants and Non-Combatants, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65 (Dieter Fleck ed., 1995) 4
Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41 11
HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT (1978) 7, 27
HOWARD S. LEVIE, TERRORISM IN WAR—THE LAW OF WAR CRIMES (1993) 28
Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109 (2000) 11
Edmund M. Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 MINN. L. REV. 79 (1920) 12
Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571 (2002) 8
Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998) 24

Page

THE OXFORD COMPANION TO WORLD WAR II (I.C.B. Dear ed., 1995) 27
Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503 (2003) 7
Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513 (2003) 22
PAT REID & MAURICE MICHAEL, PRISONER OF WAR (1984) 27
RICHARD B. SPEED III, PRISONERS, DIPLOMATS, AND THE GREAT WAR (1990) 28
Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328 (2002) 7, 10
WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES (43d ed. 1871) 7, 13, 19
WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1896) 4, 11, 12
Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38 (1947) 28

OTHER AUTHORITIES

150 CONG. REC. S2701 (daily ed. Mar. 11, 2004) 4
Dep't of the Army, FM 19-40, *Handling Prisoners of War* 17 (Nov. 1952) 28
Gen. Orders No. 52 (Hdqtrs. Dep't of the Pacific 1865), *reprinted in* 8 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Series II, at 674 (1899) 11
INT'L COMM. OF THE RED CROSS, COMMENTARY III, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet & Jean de Preux eds., 1960) 21
International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT'L L. 172 (1947) 8
THE FEDERALIST NO. 41 (James Madison) (Clinton Rossiter ed., 1961) 30
U.S. Dep't of War, Gen. Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*, arts. 152, *reprinted in* LIEBER'S CODE AND THE LAW OF WAR 45 (Richard Shelly Hartigan ed., 1983) 11

Page

INTEREST OF *AMICUS CURIAE*[1]

Citizens for the Common Defence ("CCD") is an association that advocates a conception of robust Executive Branch authority to meet the national security threats that confront the nation in its war against international terrorists. The organization's name derives from the Preamble to the Constitution, which recognizes that "to provide for the common defence" against foreign threats is one of the great objects of government our Constitution was meant to secure. Far from being inconsistent with "secur[ing] the Blessings of Liberty to ourselves and our Posterity," the vigorous executive power necessary to defend our nation against foreign enemies was seen by the Framers as a vital precondition to securing those blessings and an integral part of the same libertarian enterprise.

CCD's members are lawyers and law professors from across the country, most of whom served as law clerks to federal court judges or Justices of this Court, and/or as executive branch officials in the current or past Administrations. A partial list of CCD's members is included as Appendix A to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States responded to al Qaeda's attacks of September 11, 2001 by dispatching thousands of soldiers to Afghanistan to eliminate the organization's infrastructure in that country and the Taliban regime that was allied with and supported al Qaeda. During the course of these hostilities,

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of this brief. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court.

petitioner Yaser Esam Hamdi ("Hamdi") was captured on an active battlefield by military forces of the Northern Alliance, who were our allies, possessing a Kalishnikov assault rifle and fighting or preparing to fight for our enemies, the Taliban. The Northern Alliance then turned Hamdi over to United States military forces. Defense Department officials thereafter reviewed and affirmed the propriety of his continued detention. (J.A. 148-50.)

Petitioners have written their legal arguments as if these events never happened. Shorn of its statement of facts, a reader of petitioners' brief would be excused for believing that Hamdi was an ordinary American civilian, plucked off the streets of an American city far from the battlefield and jailed arbitrarily in a military prison. The briefs of petitioners and their *amici*, therefore, are permeated with a fundamental error—they fail to recognize, let alone address, the constitutional implications of the fact that Hamdi neither was charged with a civilian crime in an American courtroom nor is a civilian non-combatant detained by military or civilian authorities. Rather, Hamdi—although he now claims the protections of United States citizenship by accident of birth—was a soldier for an enemy of this nation captured during wartime on a foreign battlefield while carrying a military assault rifle that he intended to use to kill other U.S. citizens who served as soldiers in our armed forces.

Ignoring the context of Hamdi's detention, petitioners seek from this Court a truly unprecedented ruling: That, during time of war, a habeas court can second-guess the military judgment of soldiers serving in the United States armed forces during actual combat on an active battlefield thousands of miles from the United States. In seeking this highly intrusive interference with the President's authority under the Commander-in-Chief Clause of Article II of the Constitution, petitioners and their *amici* rely *exclusively* on cases that are wholly inapposite—cases addressing the constitutional rights of citizens held by *civilian* authorities and charged with

criminal offenses, and cases addressing the authority of the military to detain and prosecute *non-belligerents*. Petitioners and their *amici* simply fail to explain why these precedents limit the well-settled authority of the government under the laws of war to undertake the non-criminal detention of an actual combatant during hostilities, and to continue such detention at least until the conclusion of hostilities. Nor do they mention, much less distinguish, the many cases holding that the laws of war apply with equal force to citizens and aliens alike. In short, Hamdi's detention must be measured against the President's authority under the Commander-in-Chief Clause, not his power as chief domestic law enforcement officer.

The practical consequences of this Court's acceptance of petitioners' contrary arguments cannot be overstated, for they seek to impose on soldiers on the battlefield—for the first time in history—the obligation to provide enemy belligerents who are citizens with the full plethora of rights due to criminal defendants under the Fifth and Sixth Amendments. Moreover, they insist that soldiers defend their actions taken under fire in a civilian courtroom, thousands of miles from the battlefield, upon the same demands of proof and subject to the same evidentiary rules as apply to the neighborhood police officer. Acceptance of petitioners' arguments would destroy the essential intelligence value of captured enemy combatants who are citizens, thereby endangering the lives of soldiers on the battlefield and citizens in our cities. And their arguments would impose substantial new burdens on battlefield soldiers that would reduce the effectiveness of America's military and thus the safety and security of the American people.

With respect to detention of an enemy belligerent who is a citizen and is captured on a foreign battlefield, the laws of war, constitutional doctrine, and this nation's history are all clear: The military, exercising the President's authority under the Constitution, can detain him at least until the end of

hostilities; and a habeas court fulfills its duty under the Due Process Clause to act as a check on Executive arbitrariness by reviewing the evidence on which the military based its detention decision. Judicial inquiry under the Due Process Clause, appropriately delimited by the interests implicated in particular cases, ensures that the government acts in good faith and limits the potential for overbroad action. But trial-type procedures are not appropriate when the indicia of arbitrariness and oppression are non-existent and the consequences of judicial intervention dire. The Court has previously recognized that due process permits, and Article II compels, substantial deference to military decisionmaking, and it should defer here as well.[2]

---

[2] *Amicus* submits that the arguments set forth in this brief generally apply as well in *Rumsfeld* v. *Padilla*, No. 03-1027. To be sure, in that case respondent Jose Padilla was not captured on a foreign battlefield. But the Executive's authority to detain enemy belligerents is not limited by geography, see *Ex parte Quirin*, 317 U.S. 1 (1942), and the laws of war permit the military to detain enemy combatants—for example, spies and saboteurs—captured behind its own lines. See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 769 (2d ed. 1896); Knut Ipsen, *Combatants and Non-Combatants, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65, 98 (Dieter Fleck ed., 1995). The nature of Padilla's combat role and the circumstances of his capture, however, may require the government to provide a more detailed factual proffer to a habeas court than with respect to Hamdi, and indeed the Mobbs Declaration submitted in *Padilla* is significantly more detailed than that in this case. Moreover, the government engaged in a substantial and detailed decisionmaking process before determining that Padilla was an enemy belligerent. See 150 CONG. REC. S2701 (daily ed. Mar. 11, 2004) (reprinting Feb. 24, 2004, remarks by Alberto R. Gonzales before the American Bar Association Standing Committee on Law and National Security). Just as the judiciary lacks institutional competence to second-guess battlefield decisions by military commanders, see *infra*, at 25, so too should it defer to the expertise of, and the information available to, the expert decisionmakers in *Padilla*. And the personal involvement of the President in classifying Padilla as an enemy combatant provides a stronger separation-of-powers mandate for deference to that decision. See *Dalton* v. *Specter*, 511 U.S. 462, 474-77 (1994); *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111-12 (1948); *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 44 (1849).

ARGUMENT

I. THE EXECUTIVE POSSESSES AUTHORITY TO DETAIN HAMDI AS AN ENEMY COMBATANT.

Petitioners argue that the Executive lacks authority to detain a citizen as an enemy combatant through the conclusion of hostilities—and indeed lacks the authority to detain such a person *at all* "[o]utside of the area of actual fighting."[3] (Pet. Br. 28-35.) These arguments ignore this Court's precedents, the laws of war, our nation's history, and Congress' authorization of such detention.

A. The President's Inherent Powers As Commander In Chief Authorize The Executive's Detention Of Hamdi.

1. Article II of the Constitution provides: "The President shall be Commander in Chief of the Army and Navy of the United States." U.S. CONST. art. II, § 2, cl. 1. "The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago & S. Air Lines*, 333 U.S. at 109. Thus, the Constitution gives the President "the very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its

[3] Petitioners' apparent concession that the military may detain enemy belligerents in an "area of actual fighting" means less than it first appears, for they rely only on general principles applicable to the military's authority over all citizens, even loyal civilians. (Pet. Br. 30.) Even on the battlefield itself, therefore, petitioners remarkably refuse to concede that there are *any* legal implications arising from Hamdi's belligerency.

exercise an act of Congress . . . ." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

Petitioners concede that the Commander-in-Chief Clause "necessarily entails plenary executive authority in areas of actual fighting," but claim that this authority is "only temporary" and evaporates once "the citizen is removed from the area of actual fighting."[4] (Pet. Br. 28-29.) The text and history of the Commander-in-Chief Clause provide no support for this proposition. The President's power to detain enemy belligerents lies at the core of his "purely military" authority to "employ [military forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850). As one treatise discussed shortly after the Civil War, with specific reference to that conflict:

> The framers of the Constitution having given to the commander-in-chief the full control of the army when in active service, subject only to the articles of war, have therefore given him the full powers of capture and arrest of enemies, and have placed upon him the corresponding obligation to use any and all such powers as may be proper to insure the success of our arms. To carry on war without the power of capturing or arresting enemies would be impossible. We should not, therefore, expect to find in the Constitution a provision which would deprive the country of any means of self-defence in time of unusual public danger.

WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 173 (43d ed. 1871). See also *id.* at 83.

Moreover, the detention of enemy belligerents is an ordinary and universally recognized incident of the power to wage war. Under the laws of war, enemy combatants who are captured may be detained at least until after cessation of active hostilities. See Geneva Convention (III) Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, arts. 21 and 118, 6 U.S.T. 3316, 3334, 3406, 75 U.N.T.S. 135, 152, 224; HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 417-21 (1978). Even civilians may be detained until the end of the conflict if they engage in hostile activities. See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War ("Geneva IV"), Aug. 12, 1949, art. 5, 6 U.S.T. 3516, 3520-22, 75 U.N.T.S. 287, 290-92; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 512-14 (2003). Importantly, the Geneva Conventions provide no exemption from detention as a belligerent for citizens of the detaining power who fight for the enemy.[5] See LEVIE, *supra*, at 74-76; Susan

---

[4] The Second Circuit in *Padilla* erred in holding that the Commander-in-Chief Clause makes an exception to the President's inherent authority for enemy belligerents detained "on American soil outside a zone of combat." *Padilla* v. *Rumsfeld*, 352 F.3d 695, 712-18 (2d Cir. 2003), *cert. granted*, No. 03-1027. Courts are ill-equipped to make the judgment whether particular territory is within the "zone of combat." See *infra*, at 25. Moreover, quite obviously, al Qaeda considers American cities and airports part of the battlefield. Cf. *United States ex rel. Wessels* v. *McDonald*, 265 F. 754, 763-64 (E.D.N.Y. 1920) (in World War I, the port of New York, and indeed "the territory of the United States," was within "the field of active operations").

[5] Petitioners' *amici* concede that Hamdi's U.S. citizenship does not exempt him from detention as a combatant. See Brief of *Amici Curiae* Experts on the Law of War in Support of Petitioners ("Law of War Experts Brief") at 28 n.22. The government has designated Hamdi an unlawful combatant. Cf. Brief *Amici Curiae* of Law Professors, Former Legal Advisers of the Department of State, *et al.* ("Law Professors *Rasul* Brief") at 10-14, *Rasul* v. *United States* (Nos. 03-334, 03-343) (demonstrating that Taliban fighters are unlawful combatants); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 335 (2002) (same). The Court need not decide whether this designation is correct because Hamdi may be detained no matter whether

Elman, *Prisoners of War under the Geneva Convention*, 18 INT'L & COMP. L.Q. 178, 180-82 (1969). Neither petitioners nor their *amici* have cited any authority for the remarkable proposition that the Framers of our Constitution intended to allow the President to authorize the military on the battlefield to kill citizens fighting for the enemy, but not detain them as enemy belligerents under the laws of war.[6]

Under the laws of war, "captivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.'" Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002) (quoting *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 229 (1947)). Internment of enemy belligerents is a non-punitive, regulatory detention that comports with substantive due process if not "excessive in relation to the regulatory goal." *United States* v. *Salerno*, 481 U.S. 739, 746-47 (1987). Such detention readily satisfies that standard. See *id.* at 748 ("[I]n times of

---

he is a prisoner of war, an unlawful combatant entitled to the protections accorded civilians under Geneva IV, or an unlawful combatant not entitled to the protections of the Geneva Conventions at all. At the end of hostilities, if he is a prisoner of war he must be repatriated; if he is an unlawful combatant he can be tried for not only any war crimes he committed, but also his "mere participation in hostilities." Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L REV. RED CROSS 45, 70-71 (2003).

[6] Cf. *Moyer* v. *Peabody*, 212 U.S. 78, 84-85 (1909); Elman, *supra*, at 181 ("'[a]ll persons whom a belligerent may kill become his prisoners of war on surrendering or being captured.'"). Petitioners' argument that the Executive's authority to detain is limited to the battlefield is inconsistent with the GPW, which requires the detaining power, "as soon as possible after their capture," to remove enemy soldiers from the "combat zone." GPW art. 19, 6 U.S.T. at 3334, 75 U.N.T.S. at 152. Under petitioners' rule, the GPW would undermine itself: It would require that detainees be moved to a location that would entitle them to rights beyond those it mandates.

war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous."); *Ludecke* v. *Watkins*, 335 U.S. 160 (1948); Brief of Citizens for the Common Defence as *Amicus Curiae* in Support of Respondents ("CCD *Rasul* Brief") at 16-20, *Rasul* v. *United States* (Nos. 03-334, 03-343).

2. Petitioners' claim that the Constitution bars outright the military detention of enemy belligerent citizens off the battlefield—*i.e.*, that citizens are entitled to an exemption from the ordinary principles regarding the detention of enemy belligerents—is flatly inconsistent with this nation's history.[7] The courts, the Executive Branch, and Congress all have recognized that the military can detain a U.S. citizen who is an enemy soldier.[8] The permissibility of military detention of U.S. citizens for engaging in combat against this country was recognized by the Pennsylvania Supreme Court before adoption of the Constitution. See *Respublica* v. *Chapman*, 1 U.S. (1 Dall.) 53 (Pa. 1781) (holding that a person born and residing in Pennsylvania could not be prosecuted for treason for conduct that pre-dated the formation of the state government, but could be held as a prisoner of war). In *Ex*

---

[7] International practice similarly demonstrates no exemption from detention for citizens of the detaining power. See Elman, *supra*, at 182 (during the Boer War, Irish soldiers who fought for the Boers were detained as enemy belligerents by the British).

[8] That the government might have charged Hamdi with civilian crimes is beside the point. The Executive has unreviewable discretion to choose whether to apply criminal law or exercise its rights as a belligerent. *The Prize Cases*, 67 U.S. (2 Black) 635, 673 (1862). See also *id.* at 670 (rejecting the argument that Confederates "are not enemies because they are traitors"). During wartime, with respect to citizens who are enemies, "[t]hey [the United States] could act both as belligerent and sovereign," and could take either belligerent or sovereign acts "when, where, and as they chose. It was a matter entirely within their sovereign discretion." *Lamar* v. *Browne*, 92 U.S. 187, 195 (1875).

parte Quirin, 317 U.S. 1 (1942), this Court held that "[c]itizenship in the United States of an enemy belligerent" does not exempt him from detention by the military under the laws of war, including even the jurisdiction of a military tribunal to try and execute him for war crimes.[9] *Id.* at 37-38.

Other courts have agreed. In *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946), the court rejected a habeas challenge by a U.S. citizen who fought in the Italian army and was detained as a prisoner of war, holding that his citizenship did not provide an exemption to the laws of war. In *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956), the Tenth Circuit rejected the habeas petition of a U.S. citizen convicted by a military commission of spying for Germany during World War II, noting that "the petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war." See also *Johnson* v. *Jones*, 44 Ill. 142, 154 (1867).

Our nation's military history is wholly consistent with these cases. During the Civil War, the United States military detained over 200,000 United States citizens as prisoners of

[9] Petitioners are incorrect in referring to this passage as "dictum." (Pet. Br. 36, 37.) One of the *Quirin* petitioners claimed U.S. citizenship, so it was necessary for the Court to decide whether he was entitled to any additional procedures by virtue of that citizenship. Moreover, petitioners (Pet. Br. 12) and the Second Circuit, *Padilla*, 352 F.3d at 715-16, err in claiming that the congressional authorization that was present in *Quirin* does not exist here. For congressional authorization, the *Quirin* Court relied on Article 15 of the Articles of War, see 317 U.S. at 27-28, which is now codified as Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 821. See Wedgwood, *supra* note 5, at 334. Finally, the Second Circuit also erred in suggesting that the petitioners in *Quirin* conceded that they were belligerents. *Padilla*, 352 F.3d at 716. In fact, as their counsel stated at oral argument in this Court, "some of them . . . maintained they had joined the mission to escape Nazi Germany and had no intention of committing sabotage or actions of violence." See David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 70 (1996).

war.[10] Moreover, over 2,000 other citizens who, in fighting for the Confederacy, violated the laws of war were detained, tried, and punished by the military as unlawful combatants—all without the protections of the Fifth and Sixth Amendments. See, *e.g.*, WINTHROP, *supra* note 2, at 783-84; Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41, 43. A notable example was the military prosecution of T.E. Hogg and associates, who (in circumstances reminiscent of the events of September 11, 2001) boarded a U.S. merchant steamer in Panama wearing civilian clothes with the intent of seizing the ship for the Confederacy. See Gen. Orders No. 52 (Hdqtrs. Dep't of the Pacific 1865), *reprinted in* 8 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Series II, at 674 (1899). The reviewing authority, Major-General McDowell, denied the defendants' claims for a right to trial by jury under the Constitution because they were "belligerent enemies to the United States." *Id.* at 677.

Indeed, Congress itself has explicitly subjected U.S. citizens who are *civilian non-combatants* to military detention and trial. Since before this nation's independence, civilians who aid the enemy have been subject to military punishment, now pursuant to Article 104 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 904. See Edmund M.

[10] See William B. Hesseltine, *Civil War Prisons—Introduction*, *in* CIVIL WAR PRISONS 5, 6 (William B. Hesseltine ed., 1972). Although the United States accorded to Confederate soldiers the status of prisoners of war, it did not recognize the Confederacy as a separate nation, and it therefore considered and treated Confederate soldiers as disloyal United States citizens who remained subject to prosecution for treason. See Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 114-15 (2000); U.S. Dep't of War, Gen. Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*, arts. 152-54, *reprinted in* LIEBER'S CODE AND THE LAW OF WAR 45, 70-71 (Richard Shelly Hartigan ed., 1983).

Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 MINN. L. REV. 79, 97-107 (1920). Citizens who spy for the enemy during war are also triable by military commission for violation of Article 106 of the UCMJ, 10 U.S.C. § 906. See WINTHROP, *supra* note 2, at 766; Morgan, *supra*, at 111-12. If the government can constitutionally punish a citizen who is a non-combatant in these circumstances, *a fortiori* it can detain a citizen who has taken up arms against this country.[11]

3. This Court consistently has held, in contexts other than detention of a combatant, that citizens are *not* exempt from the ordinary laws of war. For example, in *Miller* v. *United States*, 78 U.S. 268 (1870), the Court upheld, against constitutional challenge by a citizen, exercise by Congress during the Civil War of "an undoubted belligerent right" to seize property of the enemy, in this case stock certificates located in and held by a citizen of the United States. *Id.* at 304-07. See also *Juragua Iron Co.* v. *United States*, 212 U.S. 297, 305-06 (1909) (property owned by a citizen located in enemy territory during the Spanish-American War was subject to seizure or destruction by the military); *The Venus*, 12 U.S. (8 Cranch) 253, 288 (1814) (opinion of Marshall, C.J.) ("a hostile character [attaches] to the property of an American citizen continuing, after the declaration of war, to reside and trade in the country of the enemy"). In *Brown* v. *Hiatts*, 82 U.S. (15 Wall.) 177 (1872), the Court held that, since inhabitants of the Confederacy were in enemy territory,

[11] See also Unlawful Traffic with Indians, 13 Op. Att'y Gen. 470, 471-72 (1871) (citizens who provided hostile Indians with ammunition were subject to military detention and "trial and punishment by court-martial"); Military Commissions, 11 Op. Att'y Gen. 297, 315 (1865) (if a citizen "is an active participant in the hostilities, it is the duty of the military to take him a prisoner without warrant or other judicial process, and dispose of him as the laws of war direct").

under the laws of war the courts of the United States were closed to them. *Id.* at 184. See also WHITING, *supra*, at 342

4. Each of the cases on which petitioners place heavy reliance in support of their claim that the Executive lacks authority over combatants outside of the battlefield addresses the detention of non-belligerents. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), for example, which was limited to its facts by *Quirin*, 317 U.S. at 45, was based on the Court's conclusion that, because Milligan was not "part of or associated with the armed forces of the enemy," he "was a non-belligerent, not subject to the law of war." *Id.* In *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), this Court noted that "[o]ur question does not involve the well-established power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war." *Id.* at 313-14. In *Ex parte Endo*, 323 U.S. 283 (1944), the Court specifically relied on the fact that Endo, a concededly loyal Japanese-American, was detained by "a civilian agency, . . . not by the military," and noted "that we do not have here a question such as was presented in *Ex parte Milligan* or in *Ex parte Quirin*, where the jurisdiction of military tribunals to try persons according to the law of war was challenged in habeas corpus proceedings." *Id.* at 297-98 (citations omitted). *Endo* was, in any event, decided on *statutory*, not constitutional, grounds. *Id.* at 300-04. *Reid* v. *Covert*, 354 U.S. 1 (1957), held only that courts-martial lacked jurisdiction, during times of peace, over civilian (non-belligerent) dependents of service members, and specifically distinguished crimes committed in areas of "active hostilities." *Id.* at 33-34 (plurality opinion). Finally, *In re Stacy*, 10 Johns. 328 (N.Y. 1813), dealt with a citizen who was charged with treason, a civilian crime, before a court-martial; the court specifically based its decision on the fact that "[a] military commander is here assuming criminal jurisdiction over a private citizen." *Id.* at 334.

The cases involving the law of prize and the Captured and Abandoned Property Act (Pet. Br. 27) are likewise unhelpful to petitioners. The inquiries made by a court sitting in prize, which usually occurred *after* the end of hostilities, were in fact quite narrow and deferential to the government. The government's libel need not have explained why the ship had been seized or became a prize of war; it must only have alleged generally the capture of the vessel as a prize of war. See *The Andromeda*, 69 U.S. (2 Wall.) 481, 490 (1864). If the vessel's claimants contested the libel, they were allowed to present evidence only in the form of papers from the vessel and test oaths from the crew. See *The George*, 14 U.S. (1 Wheat.) 408, 409 (1816). "If the captured vessel be plainly an enemy, immediate condemnation is certain and proper." *Id.* In addition to the extremely limited evidence permitted, moreover, the inquiry was substantially less intrusive than a trial-type habeas hearing because the ship, its crew, and those capturing it were already in port, near the courthouse. Similarly, contrary to petitioners' suggestion, Captured and Abandoned Property Act cases did not involve judicial review of the "propriety of military seizures" of property. (Pet. Br. 27.) Indeed, the Court recognized that the seizures were permitted under the laws of war because "property found in enemy territory is enemy property, without regard to the *status* of the owner. In war, all residents of enemy country are enemies." *Lamar* v. *Browne*, 92 U.S. 187, 194 (1875) (emphasis in original). Rather, judicial involvement was based on a statute enacted by Congress to make war more "humane" by providing reimbursement to loyal owners of property. *Id.* at 194-96.

In short, *none* of these cases, nor the others cited by petitioners, has any relevance to the detention by the military of an enemy belligerent.

B. Congress Authorized The Executive To Detain Hamdi.

Petitioners assert that a provision of the federal criminal code, 18 U.S.C. § 4001(a), bars the President from detaining Hamdi "[o]utside of the area of actual fighting." (Pet. Br. 30, 37.) They are wrong, for Congress intended this provision to prohibit the use of detention camps such as those used during World War II to detain loyal citizens of Japanese descent. There is no indication in § 4001(a)'s legislative history that it was intended to override the Executive's traditional authority to detain enemy belligerents captured on a foreign battlefield.[12] When Congress enacted § 4001(a) it surely knew of historical examples of U.S. citizens who had been soldiers fighting against this country. It therefore would be illogical to assume that Congress *sub silentio* intended to overrule centuries of precedent and history with respect to detention of belligerents when it specifically addressed the Japanese internment. Moreover, there simply is no textual support in § 4001(a)'s language for petitioners' distinction between the detention of belligerents on and off the battlefield; the statute, if applicable, speaks without exception.

---

[12] See Brief for the Petitioner at 44-49, *Rumsfeld* v. *Padilla* (No. 03-1027); Brief for United States Senators John Cornyn and Larry E. Craig as *Amicus Curiae* at 21-30. The Second Circuit in *Padilla*—based solely on floor statements of individual members—concluded that § 4001(a) was intended to apply "during war and other times of national crisis." 352 F.3d at 718-20. But that conclusion says nothing about whether Congress intended it to apply to detentions by the *military* of *enemy belligerents*. Nothing in the House Report, see H.R. REP. NO. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435—which the *Padilla* court did not even discuss—even remotely supports the Second Circuit's holding, and individual members' statements cannot bear the weight the Second Circuit put on them. See *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 n.9 (1972).

In any event, Congress authorized detentions such as that of Hamdi in at least three separate ways. *First*, on September 18, 2001, Congress authorized the President "to use *all* necessary and appropriate force against those nations, organizations, or *persons*" involved with September 11, including those who (like the Taliban) "harbored such organizations." Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (emphasis added). There can be no serious argument that the AUMF did not authorize the military to kill Hamdi as he fought for the Taliban. But the authority to kill enemy soldiers necessarily includes the power to capture them, and "force" includes the power to detain. See *supra*, at 8 & n.6.

Second, treaties ratified by the Senate are "the supreme Law of the Land." U.S. CONST. art. VI, § 2. As explained above, the GPW specifically authorizes the detention, at least until the end of hostilities, of an enemy belligerent, and contains no exemption for citizens of the detaining power. Recognizing the congressional authorization embodied in ratification of the GPW, where in accord with Executive action, would be entirely consistent with the separation-of-powers concerns animating *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Third, precedent requires this Court to conclude that 10 U.S.C. § 956(5) authorizes the detention of enemy belligerents. That statute, in addition to appropriating funds, authorizes the Secretary of Defense to prescribe regulations for the "maintenance, pay, and allowances of prisoners of war" and others in "similar" "status."[13] 10 U.S.C. § 956(5). In *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), Chief Justice Marshall interpreted an "act for the safe keeping

[13] The Second Circuit therefore clearly erred in stating that "Section 965(5) authorizes nothing beyond the expenditure of money." *Padilla*, 352 F.3d at 724.

and accommodation of prisoners of war"—which authorized the President to "make such regulations and arrangements . . . as he may deem expedient" for prisoners of war and also appropriated funds for this purpose, see 2 Stat. 777 (1812)—as being a substantive grant of authority to the President which gave him "very great discretionary powers respecting their persons." 12 U.S. (8 Cranch) at 126. *Brown* applies fully to § 956(5).

II. UNDER SETTLED DUE PROCESS PRINCIPLES, HAMDI RECEIVED ALL THE PROCESS THAT HE IS DUE.

The Due Process Clause plays a central and essential role in preventing arbitrary Executive action, including arbitrary detentions. The history of the Clause, and its derivation from Magna Carta, testify to its function as an essential bulwark of liberty. Thus, *amicus* agrees that the Clause, via the writ of habeas corpus, requires the courts to review Executive detentions of U.S. citizens to guard against arbitrariness and oppression.

This Court has long recognized, however, that due process is a flexible concept that "depends on [the] circumstances." *Moyer* v. *Peabody*, 212 U.S. 78, 84 (1909). This Court has never held that due process, as enforced via the writ of habeas corpus, requires in every circumstance the trial-type hearing applicable in a collateral attack of a criminal conviction. See, *e.g.*, *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, 312 (1946). Searching habeas review is simply an unnecessary and constitutionally inappropriate effort to intrude into core Article II Executive war powers—and would impose severe costs in terms of military effectiveness and national security—where the habeas petitioner was detained as an enemy belligerent on a foreign battlefield, the number of citizens detained is small, and there are no indicia of bad faith evident from the circumstances of the detainee's capture

or detention.[14] In such circumstances, due process is satisfied when the government describes, under oath and for the court's review, (1) the facts establishing that that the citizen-detainee was captured on or near a foreign battlefield and (2) the basis for the military's considered professional judgment that the detainee was an enemy belligerent. Because the Mobbs Declaration satisfies this standard, Hamdi received all the process that was due him under the Constitution.[15]

The circumstances of Hamdi's detention counsel powerfully for a restrained judicial role in reviewing the military's professional judgment that Hamdi was an enemy belligerent. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker* v. *Sec'y of State*, 378 U.S. 500, 509 (1964)). Although the government concedes that the federal courts have jurisdiction to entertain petitioners' habeas petition, the context here of a battlefield detention of an enemy combatant infuses the constitutional analysis. In the ordinary context, the Due Process Clause seeks, after

---

[14] As noted above, see note 2, *supra*, when an enemy belligerent is captured outside of a foreign battlefield, due process may require the government to provide a somewhat more detailed explanation of the circumstances of the citizen's detention and justification for the conclusion that he is an enemy combatant. The ultimate purpose of the due process review, however, remains the same: for the government to provide sufficient evidence for a judicial check against Executive arbitrariness, not for courts to conduct trial-type hearings in order to second-guess military or intelligence decisions.

[15] The cases on which petitioners rely are not to the contrary. (Pet. Br. 16-17, 19-21.) None involved battlefield detentions of enemy soldiers. Cases involving criminal defendants, deportable aliens, and property deprivation—all within the United States, all unrelated to a hostile foreign power, all unconnected to war—involve substantially different considerations, including a dramatically weaker governmental interest. See CCD *Rasul* Brief, *supra*, at 16-20.

weighing the costs of judicial intervention, to reduce the risk of erroneous decisions that deprive the innocent of life, liberty, or property. See *Greenholtz* v. *Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979). But error—and severe deprivations of life, liberty, or property otherwise imposed on innocents—inevitably permeates the conduct of war. See CCD *Rasul* Brief, *supra*, at 16-18. Thus, any effort to apply due process principles applicable to criminal prosecutions or property deprivations, rather than those that apply in the context of war, will severely impair military effectiveness. See WHITING, *supra*, at 177. At the same time, the fact that Hamdi was detained on a foreign battlefield, and that the determination of his status as an enemy belligerent was made on that battlefield by the military, not by political officials, provides powerful reassurance that searching judicial review is not required to avoid oppression and arbitrariness by the Executive.

As explained below, under applicable laws of war, a non-citizen detained on the battlefield is entitled to *no process at all*—neither a hearing nor counsel—to challenge the detaining power's determination that he is an enemy belligerent. Moreover, separation-of-powers principles mandate judicial deference to the military's battlefield judgment about a citizen-detainee's belligerency. Indeed, this Court has repeatedly circumscribed the scope of habeas review of military decisions. Providing oversight beyond review of the Mobbs Declaration, particularly the trial-type hearing sought by petitioners and the extensive procedures ordered by the district court, is inconsistent with the proper judicial role, dangerous to national security, and in all events unnecessary to safeguard the liberty of the American people against arbitrary detention.

A. The Laws Of War, The Separation Of Powers, And Precedent All Require Deferential Review Of The Military's Detention Of Hamdi.

1. Evaluation of petitioners' arguments must begin with the absence of legal authority for providing a captured enemy combatant with *any* judicial forum for challenging the detaining military's determination that he is a belligerent. No court has ever held that a prisoner of war or other detained combatant has the right to any process to prove his non-belligerency, or that, contrary to their express text, the Fifth and Sixth Amendments apply to enemy belligerents. See U.S. CONST. amend. V (excepting "cases arising in the land or naval forces"); *id.* amend. VI (applying to "all criminal prosecutions"). In *Colepaugh* v. *Looney,* 235 F.2d 429 (10th Cir. 1956), the Tenth Circuit held that the "matter of fact" whether the habeas petitioner (who was a U.S. citizen tried and convicted by military commission for spying for Nazi Germany) was a combatant was "not within the scope of [the court's] inquiry" upon habeas review. *Id.* at 432.

The laws of war likewise provide no procedure for a detainee to challenge the military's belligerency determination.[16] The GPW—the culmination of an exhaustive process to protect the rights of combatants

[16] Notably, *amici* "experts on the law of war" do not claim otherwise; their brief does not assert that Hamdi is entitled to a "competent tribunal" in order to litigate his claim to lack of belligerency. See Law of War Experts Brief, *supra* note 5, at 14. Moreover, this Court should reject the efforts of petitioners' *amici* (see Brief of *Amici Curiae* International Law Professors Listed Herein in Support of Petitioners) to convince this Court to use customary international law (based largely on treaties to which the United States is not a party and decisions of "regional human rights courts" to which the United States is not subject) to impose restrictions nowhere expressed in the Constitution, this Court's precedents, Congress' enactments, or treaties ratified by the Senate and enforceable by private parties. See CCD *Rasul* Brief, *supra*, at 28-30; Law Professors *Rasul* Brief, *supra* note 5, at 6-7.

captured by the enemy during wartime and reflecting the consensus view of the laws of war—provides *no forum* for a captured enemy to challenge his status as a belligerent. Article 5 provides:

> Should any doubt arise as to whether persons, *having committed a belligerent act* and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

6 U.S.T. at 3324, 75 U.N.T.S. at 140-42 (emphasis added). The "competent tribunal" envisioned by Article 5 *presumes* that the detainee committed a belligerent act and therefore leaves that determination to the discretion of the detaining power.[17] See Law Professors *Rasul* Brief, *supra* note 5, at 21-22.

Amici "experts on the law of war" err in claiming that the United States violated Article 5 by not empanelling a "competent tribunal" to determine whether Hamdi is entitled to prisoner-of-war status, and that this violation entitles Hamdi to habeas relief. See Law of War Experts Brief, *supra* note 5, at 6-15. See also Pet. Br. 17-18. The text of Article 5 clearly states that a competent tribunal is required *only* "[s]hould any doubt arise" about a detainee's status, a determination that the GPW delegates to the detaining power.[18] Here, after the extensive review afforded Hamdi,

[17] The official commentary on Article 5 likewise contains no indication that detainees are entitled to a hearing to dispute their belligerent status. See INT'L COMM. OF THE RED CROSS, COMMENTARY III, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 73-78 (Jean S. Pictet & Jean de Preux eds., 1960).

[18] See Law Professors *Rasul* Brief, *supra* note 5, at 21-22. Even critics of the Administration's policies have agreed that the existence of such a

see J.A. 149-50, the military determined that there is no such doubt. Indeed, those procedures themselves exceed the requirements of Article 5, which does not contemplate judicial involvement. In any event, Article 5 is relevant solely to the question whether a detainee is entitled to prisoner-of-war status and therefore the conditions of his confinement; as explained above, the government may detain Hamdi whether or not he is a prisoner of war. See note 5, *supra*.

Finally, whether the government's treatment of Hamdi comports with the GPW is a matter for sovereign-to-sovereign negotiations, not for resolution by a habeas court. See CCD *Rasul* Brief, *supra*, at 21. *Amici* "experts on the law of war" assert that, in denying habeas relief, the Fourth Circuit erred in relying on its conclusion that the GPW is not self-executing because even a non-self-executing treaty provides the "rule of decision" in a habeas proceeding as a result of the reference to treaties in the habeas statute, 28 U.S.C. § 2241(c)(3). See Law of War Experts Brief, *supra* note 5, at 16-20. They are wrong. The courts of appeals have consistently and uniformly held that a treaty that is not self-executing cannot form the basis for habeas relief.[19]

---

doubt is determined by the detaining power. See Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513, 1518 (2003) ("If the *United States* has any doubt about whether they are prisoners of war, then it needs to employ competent tribunals to decide whether they are prisoners [of war] or not." (emphasis added)).

[19] See, *e.g.*, *Bannerman* v. *Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wang* v. *Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003); *Wesson* v. *U.S. Penitentiary Beaumont, TX.*, 305 F.3d 343, 348 (5th Cir. 2002), *cert. denied*, 537 U.S. 1241 (2003); *United States ex rel. Perez* v. *Warden*, 286 F.3d 1059, 1063 (8th Cir.), *cert. denied*, 537 U.S. 869 (2002); *Garza* v. *Lappin*, 253 F.3d 918, 924 (7th Cir.), *cert. denied*, 533 U.S. 924 (2001).

2. Separation-of-powers principles likewise dictate that courts should act as a check on Executive arbitrariness only by requiring production of, and reviewing, evidence supporting the military's battlefield determination that a citizen was an enemy belligerent. This Court has explained that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988). See also *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952). The Executive's decisions involving the war power are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines*, 333 U.S. at 111.

Indeed, this Court already has held that the judiciary must defer to the Executive with respect to the very factual determination that petitioners seek to challenge through trial-like procedures. In *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), this Court stated: "Whether the President in fulfilling his duties, as Commander-in-chief, . . . [chooses] to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *Id.* at 670.

This Court has held similarly in analogous contexts. *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 43 (1849), explained that a President's decision to federalize the state militia to quell a domestic insurrection was judicially unreviewable:

> After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the

people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endeavouring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order.

3. As a consequence, where, as here, the military's detention of a citizen is reviewable, this Court nonetheless has mandated substantial deference to the military's determinations. Indeed, there is "a long tradition limiting the scope of habeas corpus inquiry in the military context." Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1039 (1998). For example, the Court has refused to review disputes of fact determined by courts-martial and limited judicial review to a determination of whether the military courts "dealt fully and fairly" with the defendant's claim. See *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion); *Brosius* v. *Warden*, 278 F.3d 239, 243 (3d Cir. 2002). The deference to the military has extended to military jurisdiction over persons not service members. Thus, the Court has held that, in the absence of substantial procedural irregularities, courts should reverse military induction orders only if "there was no evidence to support the order." See *Cox* v. *United States*, 332 U.S. 442, 448-49 (1947); *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, 312 (1946). See also *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19 (1827). In short, the Court has permitted only limited judicial review of denials of citizens' liberty similar in kind to, and potentially more threatening to life and limb than, that imposed on Hamdi. This judicial deference represents a recognition by the Court that when (as in the habeas statute) Congress does not specifically address the context of military detentions, the traditional Article II

limitations on judicial review of the President's commander-in-chief authority apply.

B. Acceptance Of Petitioners' Arguments Would Interfere Dramatically With National Security.

1. Additional procedures—particularly access to counsel and a right to discovery—would violate separation-of-powers principles, endanger military effectiveness, and create substantial practical problems on the battlefield.[20] *First*, courts are ill-equipped to evaluate battlefield determinations of a detainee's belligerent status, and this Court has repeatedly refused to second-guess the military's battlefield decisions. Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence" than "professional military judgments." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). As Judge Kaufman has explained, "the methods employed in waging war are difficult to sift, *sui generis* in nature and not of a kind ordinarily involved in framing a question for judicial resolution," and the review conducted by the courts therefore should recognize "the difficulty encountered by a domestic judicial tribunal in ascertaining the 'facts' of military decisions exercised thousands of miles from the forum." *DaCosta* v. *Laird*, 471 F.2d 1146, 1148 (2d Cir. 1973). This Court therefore has declined to "second-guess[] military orders" or "require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977).

---

[20] If this Court disagrees with the Fourth Circuit that the submission of the Mobbs Declaration is sufficient to satisfy due process, it should nonetheless reject petitioners' unprecedented demand for a trial-type hearing on Hamdi's status as an enemy belligerent. Rather, the Court should remand the case to permit the district court to consider what additional evidence the government might submit for *ex parte* and *in camera* review.

Second, an evidentiary hearing to second-guess battlefield judgments made by soldiers thousands of miles from the courthouse is highly impractical and burdensome.[21] Soldiers under fire on a foreign battlefield, unlike police officers in our cities, do not maintain records and information so as to ensure admissibility under the Federal Rules of Evidence, and such a requirement may well severely hamper military effectiveness. Such a hearing, moreover, would impose on the military substantial practical costs in terms of gathering and transporting witnesses and evidence from foreign battlefields. See *Johnson* v. *Eisentrager*, 339 U.S. 763, 778-79 (1950); *Reid* v. *Covert*, 354 U.S. 1, 76 n.12 (1957) (Harlan, J., concurring in the result). This Court previously has explained the even more fundamental problems with such a hearing:

> Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Eisentrager, 339 U.S. at 779.

---

[21] Such hearings also would pose a substantial threat to the Executive's primacy over foreign relations. For example, during the proceedings below, the district court criticized the Northern Alliance. A judicial decision that our military allies are untrustworthy "warlords" (J.A. 295) could have dramatic consequences for both the success of the war and our nation's diplomatic efforts. Cf. *Zschernig* v. *Miller*, 389 U.S. 429 (1968).

Third, providing an enemy combatant with access to counsel would destroy the utility of an essential military tool—"the tactical military needs of a detaining power to extract from its prisoners vital and life-saving intelligence." Stanley J. Glod & Lawrence J. Smith, *Interrogation under the 1949 Prisoners of War Convention*, 21 MIL. L. REV. 145, 145 (1963). See also J.A. 348 (declaration of Colonel Donald D. Woolfolk) (loss of the ability to interrogate enemy combatants would "crippl[e] the national security of the United States"). Combatants do not have the right to counsel upon capture or even for purposes of the "competent tribunal" to determine whether they are entitled to prisoner-of-war status; they receive counsel only if and when charged with a violation of the laws of war or other crime.[22]

The first piece of advice an enemy belligerent's lawyer inevitably would provide would be to remain silent during interrogation.[23] However, under the laws of war, "[a]ll prisoners of war are subject to interrogation on surrender." PAT REID & MAURICE MICHAEL, PRISONER OF WAR 68 (1984). "Certain prisoners of war . . . may be considered as having important and unique intelligence value, and they will probably be evacuated through special evacuation channels and to special interrogation centers." LEVIE, *supra*, at 109. Interrogation of enemy combatants was extensive during both world wars. See THE OXFORD COMPANION TO WORLD WAR II, at 914-15 (I.C.B. Dear ed., 1995); RICHARD B. SPEED III,

---

[22] A detainee receives counsel and extensive procedural rights once he is charged with a war crime, as in *Quirin* and *In re Yamashita*, 327 U.S. 1 (1946). See GPW arts. 99-108, 6 U.S.T. at 3392-3400, 75 U.N.T.S. at 210-18; Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[23] Introduction of counsel also would destroy the environment of "dependency and trust" that is needed for successful interrogation. See J.A. 349 (Woolfolk declaration); J.A. 80-81, *Padilla* v. *Rumsfeld*, No. 03-1027 (declaration of the Director of the Defense Intelligence Agency).

PRISONERS, DIPLOMATS, AND THE GREAT WAR 127 (1990). Information from enemy detainees during World War II was invaluable in the Allies' war effort—indeed, it was "the most profitable" source of intelligence. ROBERT R. GLASS & PHILLIP B. DAVIDSON, INTELLIGENCE IS FOR COMMANDERS 21-22 (1948). See also Dep't of the Army, FM 19-40, *Handling Prisoners of War* 17 (Nov. 1952) ("The systematic and methodical interrogation of prisoners of war is one of the most productive sources of intelligence.").

Fourth, petitioners and their *amici* have placed great emphasis on the fact that the Mobbs Declaration is hearsay. These arguments ignore the extensive use of hearsay in similarly important situations. As Judge Hand noted, hearsay is often relied upon by "responsible persons . . . in serious affairs." *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 873 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938). This Court specifically approved a death sentence issued by a military commission that was not governed by common law rules of evidence, *Yamashita*, 327 U.S. at 18, 23, and hearsay is used throughout the criminal justice process.[24] The Nuremberg trials also did not bar hearsay.[25] Likewise, the International Criminal Court and current U.N.-sponsored war-crimes tribunals do not operate under strict evidence codes but may

[24] See, *e.g.*, *Gerstein* v. *Pugh*, 420 U.S. 103, 120 (1975) (probable cause hearings); *Costello* v. *United States*, 350 U.S. 359, 361-64 (1956) (grand juries); *Brinegar* v. *United States*, 338 U.S. 160, 174 n.12 (1949) (application for a warrant).

[25] See Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 53 (1947). The Nuremberg Tribunal held that "[a] fair trial does not necessarily exclude hearsay testimony and *ex parte* affidavits," and in post-war war-crimes cases literally thousands of affidavits were admitted in evidence, see HOWARD S. LEVIE, TERRORISM IN WAR—THE LAW OF WAR CRIMES 260-62 & n.131 (1993), particularly "if circumstances prevented personal attendance of witnesses whose evidence appeared to be relevant and important." Wright, *supra*, at 53 n.50.

admit any evidence based upon "the probative value of the evidence and any prejudice" that it may cause.[26] Indeed, that the Mobbs Declaration contains hearsay inevitably follows from review of the decision to detain Hamdi by a more detached and senior Executive official—additional review that *decreases* the risks of error, arbitrariness, and abuse.

2. A decision by this Court denying the Executive the authority to detain enemy belligerents who are citizens at least until the end of hostilities would interfere substantially with military effectiveness and thus with overriding national security interests. If petitioners are correct, for example, American soldiers would be required, as they remain under fire, to give *Miranda* warnings to captured enemy belligerents who claimed United States citizenship; and upon the simple invocation of the right to counsel by the detainee, our military would be denied the ability to interrogate him for invaluable intelligence on active military operations of the enemy over the next hill or elsewhere. American military forces, discovering an American enemy combatant with evidence of an imminent terrorist attack on our troops or our cities, would be powerless to interrogate until counsel is provided and a valid waiver of the privilege against self-incrimination is obtained. And this nation's enemies would hardly forego the advantages provided by falsely claiming U.S. citizenship. Indeed, our enemies, aware via the Internet of a decision by this Court applying the protections of the Fifth and Sixth Amendments to enemy citizen belligerents detained on foreign battlefields, may well instruct *all* of their soldiers, whether U.S. citizens or not, falsely to claim American

[26] Rome Statute of the International Criminal Court, art. 69(4), U.N. Doc. A/CONF.183/9 (1998), entered into force July 1, 2002. See also Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81, 92 (1997) (war crimes tribunals for Yugoslavia and Rwanda do not bar hearsay).

citizenship upon capture or surrender to forestall interrogation and to impose massive administrative burdens on battlefield soldiers, the military in general, and indeed our civilian judicial system as well. Nothing in the Constitution, this Court's precedents, or the laws of war requires the Court to hamstring our military effectiveness in such a manner.

CONCLUSION

Petitioners essentially ask this Court to decide their case while wearing blinders. They ignore the fundamental differences between an enemy combatant captured on a foreign battlefield, on one hand, and criminal defendants and loyal citizens interned for no reason other than their race, on the other. They disregard the magnitude of the threat posed to the nation's security from judicial second-guessing of the military's battlefield decisions and subsequent Executive determinations. They overlook the inherent reassurance provided by the fact that Hamdi was captured on a foreign battlefield, and that the determination to detain him was made by professional soldiers. And, ultimately, they fail to recognize that the fundamental protections of due process are robust enough to safeguard liberty when judicial intervention is necessary to prevent governmental oppression, but flexible enough to permit the government wide latitude when, as here, the risks of such oppression are minimal and the benefits of vigorous government action so great. After all, as the Founders knew, "[s]ecurity against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union." THE FEDERALIST NO. 41, at 256 (James Madison) (Clinton Rossiter ed., 1961). And so the Constitution was established, among other objects, to "provide for the common defence," as part of an enterprise to "secure," not impede, the "Blessings of Liberty." U.S. CONST. pmbl.

The judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

ADAM H. CHARNES
Counsel of Record
JAMES J. HEFFERAN, JR.
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300

Counsel for Amicus Curiae

March 29, 2004

APPENDIX A

The following is a list of selected members of Citizens for the Common Defence:

Bradford A. Berenson
Richard D. Bernstein
Robert Bork
Adam H. Charnes
Miguel A. Estrada
David Frum
Eric George
Ed R. Haden
Charles C. Hwang
Wendy Keefer
Richard Klingler
Kris W. Kobach
Eugene Kontorovich
Christopher Landau
Kevin P. Martin
Christopher D. Moore
Stephen J. Murphy, III
Ryan D. Nelson
John Osborn
Christopher Oprison
Mathew Rosengart
Eugene Volokh
John Yoo